The trial court ordered additional discovery from Petitioners on January 10, 2003 and again on January 15, 2003. App. 21-23. By this time, Petitioners were in contempt of contempt. App. 25.

In a continuing effort to evade their obligations, Petitioners filed with the appellate court a "Writ of Prohibition Restraining the Honorable Joseph I. Papalini from exceeding jurisdiction of his court...." App. 25. Petitioners' theory behind this writ was that Petitioners' notices of appeal, in breach of their agreement, had fortuitously placed Petitioners beyond the trial court's reach. But under unambiguous rules of appellate procedure, the trial court retains jurisdiction over trial-related issues. The Writ was denied shortly thereafter. App. 25, 7-8, 29.

By February 2003, Petitioners had filed **seven** direct appeals in this case, testing the outer limits of appellate rights, which, ironically, they now complain they were denied in violation of the United States Constitution.[5]

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[5] By February 2003, Petitioners took the following appeals.

On January 16, 2003, they filed the Writ of Prohibition. This appeal was docketed at Pa. Super 5 EDA 2003.

On January 16, 2003, they appealed December 30, 2002 discovery order decreeing responses by Jan. 31, 2003. The appeal was quashed after briefing.

On January 9, 2003, they appealed the January 8, 2003 discovery order. Their appeals were docketed at Pa. Super. 186 & 187 EDA 2003. The appeals were quashed after briefing.

On January 16, 2003, they appealed the January 10, 2003 discovery order. Their appeals were docketed at Pa.

On March 10, 2003, the trial court ruled on pending post-trial motions. App. 26-28. It granted Kanter's motions for additur, for pre- and post- judgment interest, for sanctions, and for contempt citations. App. 26-28. It also ruled on Kanter's motion for a new trial on punitive damages. Regarding the latter, it found that Petitioners' deliberate, deceitful delay, non-disclosure of requested information in violation of court orders, and their deliberately misleading the jury had corrupted the punitive damage phase. App. 81-91. It gave Kanter a choice of accepting approximately triple the amount the jury had originally awarded, $645,000, or a new trial on punitive damages.[6] *Id.*, App. 26-28.

Super. 300 & 301 EDA 2003. Both appeals were quashed before argument on the motion to quash.

On January 15, 2003, they appealed the January 15, 2003 discovery order. Their appeals were docketed at Pa. Super. 299 & 302 EDA 2003. Both appeals were quashed before argument on the motion to quash.

This was not the end of their appeals. They took one more appeal to the intermediate appellate court, requested reconsideration from the appellate court, and took five appeals to the Pennsylvania Supreme Court.

[6] Petitioners are incorrect in their assertion that they did not receive a fair trial on punitive damages. Petition 16. Rather, they repeatedly and consistently abused the due process afforded them, burdening the court and prejudicing Respondents. Their corruption of the process was deliberate. They were not deprived of a hearing but sought to deprive others of a hearing.

Petitioners are also incorrect that the trial judge gained some substantive information, to which they were not

Pursuant to the March 10 Order, Kanter opted for the $645,000 by filing a praecipe for the Prothonotary to enter judgment, which the Prothonotary did the same day, March 12, 2003. App. 29.

Petitioners filed a Notice of Appeal (their eighth) from the March 10, 2003 Order, even though it left open the option of a new trial.

While proceedings before the trial court were coming to a close, Petitioners' abuse of the system was not. On May 8, 2003, the court ordered the parties to file a statement of matters complained of on appeal, pursuant to Pa. R. App. P. 1925(b). That rule provides:

> The lower court forthwith may enter an order directing the appellant to file of record in the lower court and serve on the trial judge a concise statement of the matters complained of on the appeal no later than 14 days after the entry of such order. A failure to comply with such direction may be considered by the appellate court as a waiver of all objections to the order, ruling or other matter complained of.

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privy, when he privately spoke to the jury. Petition 14. Rather, he confirmed what he had already observed – that Petitioners had dragged out the trial with sanctionable conduct and exasperated a jury that was expecting to finish its work sooner. App. 87, n. 5. Petitioners' expectations that they have a right to challenge the jurors' communications to the court through cross examination or to offer evidence contrary to the jury's expressions of exasperation is bizarre. Petition 14. In any case, this issue was not raised below.

Although Petitioners' time was extended from 14 days to a full month, they made no effort to be concise or even discriminating. App. 63. Instead, Petitioners designated virtually every perceived issue and pseudo-issue in the entire case. Each Petitioners' statement was fifteen pages. App. 12. One Petitioner designated 49 issues, and the other, 55, and each incorporated the others' issues, for a total of 104, excluding multiple sub-issues. App. 12-13, App. 31-63. "This went beyond lawyering," the trial court found, "and was *another attempt to overwhelm and overburden this court and pervert the court system.*" App. 63. [Emphasis in the original.] It found that such a designation breached Petitioners' duty of fair dealing with the Court. App. 94.

The appellate court held that Petitioners' noncompliance "... effectively precluded appellate review...." App. 13. It found that the number of issues was "preposterous" and would necessarily cause a violation of other appellate rules, such as the page limit on issues designated in the Brief of Appellant.[7] App. 14. It found that Petitioners' noncompliance was not innocent, or merely negligent, but that they committed "... misconduct when they attempted to overwhelm the trial court...." App. 14. The appellate court agreed with the trial court that Petitioners breached their duty

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[7] Even though Petitioners ultimately appealed fewer issues than they designated, they violated the one-page rule in any event. App. 15 -16.

Petitioners' statement that they "honed their focus to the most significant [of the 104] issues" in their appellate brief since they now had "the benefit of the trial court's Opinion" is disingenuous. Petition 17. They were capable of "honing their focus" sooner and Rule 1925(b) demanded as much.

of good faith and fair dealing with the court. App. 15. Its opinion was unmistakable:

> We can only conclude that the motive underlying such conduct is to overwhelm the court system to such an extent that the courts are forced to throw up their proverbial hands in frustration. While such tactics may prove successful in other situations, we are unwilling to succumb to such chicanery and will not reward such misconduct.

App. 16. Pursuant to Pa. R. App. P. 1925(b), the appellate court ruled that Petitioner's noncompliance, committed on top of all the other procedural abuses, constituted a waiver of the appeal.

Before appealing to the Pennsylvania Supreme Court, Petitioners sought reconsideration of that ruling, which was denied. App. 18.

On their appeal to the Pennsylvania Supreme Court, Petitioners raised only the issues under 1925(b). They never raised the Constitutionality of the trial court's punitive damage decision. App. 111-116. The Supreme Court denied their Petition for Allowance of Appeal.

Thereafter, Petitioners filed four more appeals with the Supreme Court, employing various tactics to prevent execution.[8]

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[8] These appeals were dockets at Pa. Supreme 110 EDA 2005 - 113 EDA 2005.

REASONS FOR DENYING THE WRIT

A. This Court Lacks Jurisdiction Over Any Questions Concerning The Trial Court's Punitive Damage Award Because The Issue Was Not Raised Before The Pennsylvania Supreme Court.

28 U.S.C. § 1257(a) allows for Supreme Court review of final judgments or decrees rendered by the highest court of a state in which a decision could be had. Moreover, the question must be one of federal law, in this case the Constitution. *Id.* The precise Constitutional question must be raised with the state supreme court to maintain jurisdiction over the question in this Court. *Howell v. Mississippi*, ___ U. S. ___, 125 S. Ct. 856, 858-859 (2005); *Adams v. Robertson*, 520 U.S. 83, 117 S. Ct. 1028 (1997); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 464, 113 S. Ct. 2711, 2723-2724 (1993).

Petitioners did not raise any argument whatsoever before the Pennsylvania Supreme Court that in any way considered the punitive damage award to constitute a violation of a federal due process right. App. 111-116. Thus, this issue, which is encompassed within Petitioners' Question Presented and comprises the bulk of their Petition for Writ of Certiorari, is not before this Court. The only purported federal issue raised before the Pennsylvania Supreme Court – and *barely* raised – is whether Petitioner Spector, Gadon & Rosen's waiver of an appeal by virtue of its designation of over 104 appellate issues and application of Pa. R. App. P. 1925(b)'s requirement of concision on peril of waiver constitutes a

federal due process violation.[9] App. 100-101.

B. The Questions Presented Do Not Concern The Constitutionality Of A State Statute Or Even Any Class Of Litigants Either Within Or Without Pennsylvania But Petitioners Alone.

Petitioners fail to establish – indeed, they do not even make the effort to establish – by any empirical examples that the waiver they complain of has any repercussions for anyone other than themselves. See Petition 17-19. Petitioners identify no other litigants, either within Pennsylvania or elsewhere, affected by a ruling that a designation of 104 issues for appeal is insufficiently concise. There is no class of litigants affected. Nor is the constitutionality of a state statute at issue. See 28 U.S.C. § 1257(a) (establishing jurisdiction where the validity of a state statute is called into question under the Constitution). Surely, petitioners have not established under Supreme Court Rule 10(b) that "a state court ... has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

Petitioners merely speculate that Pa. R. App. P. 1925(b) "will necessarily be applied in a discriminatory fashion." Without allowing the Pennsylvania appellate courts the chance to amplify the meaning of "concise" (to the extent the holding that more than 104 issues is not concise needs amplification),

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[9] The Constitutionality of the waiver was never raised on behalf of Epstein, who was separately represented before the Pennsylvania Supreme Court. Thus, he has no issue whatsoever properly before this Court.

Petitioners merely assume that the ruling ensures "the likelihood of inconsistent results." But even the "likelihood" of "inconsistent results" – if this was indeed a realistic assessment – is insufficient for Supreme Court review. In short, Petitioners apply to this Court for correction of a perceived error affecting them alone.

C. Appellate Rights Can Be Waived For Procedural Defects.

Petitioners' perceived error is not even of constitutional dimensions. For one, the right to an appeal is not essential to due process. *Lindsey v. Normet*, 405 U.S. 56, 77, 92 S. Ct. 862, 876 (1972); *District of Columbia v. Clawans*, 300 U. S. 617, 627, 57 S. Ct. 660, 626 (1937); *Ohio v. Akron Metropolitan Park District for Summit County*, 281 U.S. 74, 80, 50 S. Ct. 228, 231-232 (1930); *Luckenbach S.S. v. U.S.*, 272 U.S. 533, 47 S. Ct. 186 (1926); *McKane v. Durston*, 153 U.S. 684, 687-88, 14 S. Ct. 913, 915 (1894).[10]

Moreover, it is well within the province of state courts under the Constitution to set the parameters of appellate review and promulgate, interpret, and enforce their appellate rules to the point of imposing the sanction of waiver of an appeal. *Johnson v. Fankell*, 520 U.S. 911, 918-919, 117 S. Ct. 1800, 1804-1805 (1997) (Supreme Court will defer to state court's application of neutral, non-discriminatory appellate rule.); *Wolfe v. North Carolina*, 364 U.S. 177, 194-195, 80 S. Ct. 1482, 1491-1492 (1960) (It rests with each state to prescribe

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[10] However, the due process and equal protection clauses together prohibit discriminating on the grounds of poverty against criminal defendants seeking to appeal. *Griffin v. Illinois*, 351 U. S. 12, 76 S. Ct. 585 (1956).

the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise.); *National Union of Marine Cooks and Stewards v. Arnold*, 348 U.S. 37, 43-44, 75 S. Ct. 92, 95-96 (1954) (Statutory right of review can be waived under due process clause for noncompliance with state procedures. "It is an exercise of a state court's inherent power to use its processes to induce compliance...."); *McKane* ("... whether an appeal should be allowed, and, if so, under what circumstances, or on what conditions, are matters for each state to determine for itself."); *Backus v. Fort St. Union Depot*, 169 U. S. 557, 576, 18 S. Ct. 445, 453 (1898) (Where state rule of procedure required that party identify its objections in notice of appeal, party was not deprived of Constitutional rights by state supreme court's refusal to hear issue not identified as an objection.)

Pennsylvania courts recognize that imposing waiver as a sanction for noncompliance with Pa. R. App. P. 1925(b) falls within a court's discretion. *Commonwealth v. Atwood*, 378 Pa. Super. 21, 28, 547 A. 2d 1257, 1260-61 (1988) ("To relinquish our discretion in cases where a party has failed to comply with Pa. R. P. A. 1925 will effectively emasculate the rule and totally undercut the purpose for which it was formulated....")

The idea that Petitioners were blind-sided by the appellate court's exercise of discretion in this case is inaccurate.[11] They should have known at the time they drafted their 1925(b) statements that they would be subjecting themselves to waiver. They should have known at the time of their appeal that waiver would be an issue before the Superior

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[11] It is ironic that Petitioners are complaining that they were surprised that their 1925(b) statement became an issue on appeal when they themselves corrupted the appellate process by designating everything as an issue.

Court. For one, the Rule explicitly allows for waiver in the event of noncompliance and explicitly provides that the designation of issues must be concise. As the Superior Court observed, there are a number of other appellate rules that also indicate that 104 issues with multiple subparts cannot possibly constitute a concise statement.

The touchstone, however, is not simply the number of issues identified but the impact of the designation, whether the designation creates an impediment to meaningful and effective appellate review – an impediment the trial and appellate court determined Petitioners actually intended to create. There was more than ample precedent to establish that Petitioners' designation was noncompliant on this ground. *Commonwealth v. Dodge*, 2004 Pa. Super 338, 859 A. 2d 771, 783-784 (2004) (As in this case, designation of all issues noncompliant, quoting "substantial impediment to meaningful and effective appellate review standard" of *Commonwealth v. Lord*, 553 Pa. 415, 719 A. 2d 306 (1998).); *Commonwealth of Pa. v. Heggins*, 809 A.2d 908, 911 (Pa. Super. 2002) (Too vague an articulation of issues raised in a Rule 1925 statement is the "functional equivalent" of no 1925 statement at all.), *appeal denied*, 573 Pa. 703, 827 A.2d 430 (2003). See also *Schaffer v. Ames Capital Corp.*, 805 A.2d 534 (Pa. Super. 2002) (Failure to file a Rule 1925 statement compliant with the rule resulted in appellate issue waiver.), *reargument denied*; *Commonwealth of Pa. v. Zingarelli*, 839 A.2d 1064, 1075 (Pa. Super. 2003) (same), *reargument denied, appeal denied*, 856 A.2d 834 (Pa. 2004); *Commonwealth of Pa. v. Rose*, 820 A.2d 164, 169 n.6 (Pa. Super. 2003) (same), *reargument denied; Commonwealth of Pa. v. Seibert*, 799 A.2d 54, 61 (Pa. Super. 2002) (same), *reargument denied; Yoder v. American Travellers Life Ins. Co.*, 814 A.2d 229, 233 (Pa. Super. 2002) (same), *appeal denied*, 573 Pa. 673, 821 A.2d 588 (2003); *Commonwealth of Pa. v.*

Kimble, 756 A.2d 78 (Pa. Super. 2000) (same), *appeal denied*, 556 Pa. 659, 782 A.2d 543 (2001); *Commonwealth of Pa. v. Hunter*, 768 A.2d 1136, 1139 (Pa. Super.) (same), *appeal denied*, 568 Pa. 695, 796 A.2d 979 (2001); *Commonwealth of Pa. v. Payne*, 760 A.2d 400, 405 (Pa. Super. 2000) (same), *appeal denied*, 565 Pa. 641, 771 A.2d 1282 (2001); *Commonwealth of Pa. v. Forest*, 427 Pa. Super. 602, 607-08, 629 A.2d 1032, 1035 (1993) (same), *appeal denied*, 536 Pa. 642, 639 A.2d 28 (1994).

Thus, the appellate court had on many occasions explicitly signaled that good faith compliance with the appellate rules and with 1925(b) in particular was required if an appeal is to be preserved. As stated in *Atwood* at 1260-1261, 28-29:

> To ask this Court to do the exhaustive review . . . with no assistance from the trial judge who sat throughout the proceeding, makes a mockery of appellate review. Our system of appellate review provides an effective expeditious means for fair examination of the issues and resolution of them. It depends, however, on counsel and the trial court adhering to the Rules of Appellate Procedure if the system is not to be paralyzed. While it appears there may be issues of arguable merit to be considered on appeal, we are unable to reach them because of failure to present them properly.

Moreover, Petitioners were on notice that the appellate court could raise appealability *sua sponte*. *Horowitz v. Universal Underwriters Insurance Co.*, 397 Pa. Super 473,

476, 580, A. 2d. 395, 397 (1980).

Not only was it clear from the Rule itself and case law that waiver of their appeal under Rule 1925(b) was a risk and an issue for appeal, but Petitioners knew from the trial court's opinion itself that waiver could be an issue on appeal. For one, the trial court had to spend most of its opinion setting forth the Petitioners' 1925(b) designations. The trial court's "Preliminary Statement" observed that the case is about Petitioner's "*improper behavior*" and that Petitioners had abused Rule 1925(b) in "... another attempt to overwhelm and overburden this court and pervert the court system." App. 63. Thus, the Opinion being appealed signaled that noncompliance with Rule 1925(b) was an issue.[12]

Even if there had been no warning that waiver would be an issue for appellate review, Petitioners have not established, and cannot establish, that a court's *sua sponte* enforcing its procedural rules constitutes a violation of the Fourteenth Amendment. *Link v. Wabash Railroad Company*, 370 U.S. 626, 82 S. Ct. 1386 (1962) (It is not a due process violation for a court to *sua sponte* dismiss a case for non-prosecution even in the absence of a rule that would provide notice of a non-prosecution dismissal.) Rule 1925(b) is designed to assist the trial court in writing an opinion, and, in turn, the appellate court in considering an appeal. The parties should expect that the court will enforce such a rule to protect its own interest even if the parties themselves do not argue noncompliance with the Rule. Indeed, the Rule itself suggests that an appellate court might enforce it on its own initiative: " A failure to comply with such direction may be considered *by*

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[12] Contrary to Petitioners' characterization, the appellate court's application of Rule 1925(b) was not a "new rule," and certainly not one given retrospective impact.

the appellate court as a waiver of all objections to the order, ruling or other matter complained of."

Finally, the waiver must be viewed in context of Petitioners' remarkable history of obstruction. The designation of issues was not an innocent, isolated mistake but yet another affront to the court and the judicial process. The Superior Court discussed other misconduct and saw the designation of issues in that context. App. 1-18.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

RESPECTFULLY SUBMITTED

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No. 05-553

In The

Supreme Court of the United States

SPECTOR GADON & ROSEN, P.C.
and ALAN B. EPSTEIN, ESQUIRE,

Petitioners,

V.

NANCY KANTER, ESQUIRE,

Respondent.

On Petition For Writ Of Certiorari To The Superior Court Of Pennsylvania

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Petitioners' case for this Court's review is unaffected by anything stated in Kanter's Brief in Opposition. Kanter advances three arguments: (1) petitioners' claim has been waived by failure to preserve it in the state supreme court, Brief in Opposition at 11, (2) petitioners' question presented does not meet the standards for the grant of certiorari, *id.* at 12, and (3) petitioners's claimed due process violation does not raise a substantial federal question. *Id.* at 13-18. The arguments proffered by Kanter suffer from the same deficiencies that have marked her positions and arguments throughout these proceedings – *i.e.*, legally unsupportable argument, distortion of fact[1] and the purposeful diversion from the fundamental issue presented.

Kanter's entire analysis is premised on a mischaracterization of petitioners' claim. Kanter's Brief in Opposition fails to acknowledge that petitioners' claimed due process violation encompasses an accumulation of substantive and procedural deprivations which as a whole have resulted in a constitutionally impermissible punitive damage award against petitioners. Kanter does not, indeed cannot, offer any response to the incontrovertible record that petitioners have been subjected to an enormous punitive damage award, despite a jury verdict in petitioners' favor, without a trial, based on non-record, *ex parte* evidence, and without any appellate review whatsoever as a result of a newly created rule of waiver. Kanter's arguments, based on distortion of the law and the record, offer no real opposition to petitioners' meritorious claim.

Kanter asserts that petitioners have waived their claim, arguing that "the precise constitutional question must be raised with the state supreme court to maintain jurisdiction over the question in this court." Brief in Opposition at 11.

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[1] By way of example, Kanter repeats over and over the falsehood that petitioners raised 104 issues in their Rule 1925(b) statements where petitioner Epstein raised 49 issues and petitioner Spector Gadon & Rosen, P.C. raised 55 issues. In fact, each raised substantially the same issues in their respective Rule 1925(b) statements.

The legal proposition is misstated by Kanter, and indeed is contradicted by the cases she cites. In *Howell v. Mississippi*, 543 U.S. 440, 125 S.Ct. 856, 858 (2005), a petitioner convicted of murder in a Mississippi state court contended his rights under the Eighth and Fourteenth Amendments to the United States Constitution were violated by the court's refusal to require a jury instruction about a lesser included offense in his capital case. No such claim was raised in the state courts. In dismissing petitioner's claim as having been improvidently granted, this Court reiterated the applicable standard under 28 U.S.C. § 1257 that "this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to *the state court that rendered the decision we have been asked to review*.'" *Howell*, 543 U.S. at ___, 125 S.Ct. at 858 (emphasis added), *quoting Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*).

In this matter, the Superior Court is the "highest court in which a decision can be had" under 28 U.S.C. § 1257, and thus the court to which a petition for certiorari must be directed. *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 n.1 (1968) (where higher court declines to exercise authority to grant discretionary review, intermediate appellate court is highest court in which decision could be had). Petitioners seek review of the decision of the Superior Court, which found a waiver of petitioners' federal due process challenge to the trial court's punitive damage award.

Petitioner's claim has been preserved at each stage of the proceeding, including in the trial court, in petitioner's Rule 1925(b) statement, App. 34-35, 48-49, and in the Superior Court, both on appeal, App. 8, 10, 100-01, and in seeking discretionary *en banc* reconsideration, App. 108-09. Prior to the Superior Court's decision, petitioners could only argue the due process deprivation arising from the trial court's *sua sponte* entry of a punitive damage award without a new trial and despite a jury verdict in petitioner's favor. After the Superior Court's decision finding waiver, petitioners asserted the due process deprivation arising from the denial of any review of all of their claims,

including their claim of a due process violation in the award of punitive damages. Petitioners specifically contended:

> As a result, SGR . . . [has] been denied the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and by Article 1, § 1 of the Pennsylvania Constitution. The denial of due process is a result of an effective denial of the right to appeal in that this Court has deemed waived all of the substantive issues raised by SGR without notice or opportunity to be heard. . . .

App. 108.

This Court's jurisdictional requirements required that petitioners seek discretionary review from the Pennsylvania Supreme Court. *Stratton v. Stratton*, 239 U.S. 55 (1915). Petitioners did so by filing a Petition for Allowance of Appeal, raising the only issue available to them – *i.e.*, error, including the denial of federal due process, in the Superior Court's finding of petitioners' waiver of appellate review of all substantive issues on appeal, including deprivation of due process in the award of punitive damages. Petitioners expressly asserted that the Superior Court, "through its *sua sponte* declaration of a wholesale waiver of appellate rights, without providing notice or any opportunity to be heard . . . obliterated all semblance of the Spector Firm's due process rights, as guaranteed by both the United States and Pennsylvania Constitutions, along with the constitutionally-mandated right of access to the appellate courts. *See* U.S. Const. amend. XIV. . . ." App. 113.

There can be no question that petitioners' federal question is a substantial question that has been properly raised in the state courts. Under 28 U.S.C. § 1257, certiorari jurisdiction over state court judgments is vested in this Court where a "federal title, right, privilege or immunity is specially set up or claimed under the Constitution." This Court's jurisprudence instructs that the question is raised if presented to the state court with fair precision and if "the record as a whole shows either expressly or by clear intendment that this was done, the claim is regarded as having been adequately presented." *New York ex rel.*

Bryant v. Zimmerman, 278 U.S. 63, 67 (1928). It is generally sufficient to reference the particular clause of the federal constitution. Herein, petitioners repeatedly preserved their claims under the due process clause of the Fourteenth Amendment.

Finally, Kanter is simply incorrect that the claim has not been preserved by petitioner Epstein. In addition to joining in all arguments raised by petitioner Spector Gadon & Rosen, P.C., *see* Petition for Certiorari at 7 n.2, petitioner Epstein independently raised due process deprivation in the trial court's award of punitive damages. App. 10.

2. At p. 12-13 of the Brief in Opposition, Kanter asserts that petitioners' question presented does not meet the standards for the grant of certiorari, specifically claiming that: (1) petitioners' have not established that the constitutional deprivation complained of will impact litigants other than themselves, (2) the constitutionality of a state statute is not at issue, and (3) petitioners have not established under Supreme Court Rule 10(b) that a "state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Kanter's argument is classic misdirection.

The jurisdiction of this Court to grant a writ of certiorari to a state court is governed by 28 U.S.C. § 1257. Kanter asserts the inapplicability of Section 1257 because petitioners do not question the constitutionality of a state statute. Kanter focuses on a single clause of Section 1257 pertaining to the constitutionality of a state statute to the exclusion of the relevant provision – *i.e.*, permitting review "where any title, right, privilege or immunity is specially set up or claimed under the Constitution. . . ." Petitioners have not asserted that the constitutionality of a state statute is at issue and Kanter's argument in this regard requires no further attention.

Kanter's reference to Supreme Court Rule 10(b) is equally unavailing as she has once again focused on a provision that has no applicability to this petition. Petitioners' claim of an egregious denial of federal due process in the award of punitive damages and denial of any

appellate remedy certainly implicates a right under the federal Constitution as recognized by this Court's prior decisions. *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994); *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1 (1991). Thus, the considerations relevant to this Court's grant of certiorari are (1) the question presented relates to an important constitutional issue that has in the past merited this Court's attention, and (2) under Supreme Court Rule 10(c), the Superior Court "has decided an important federal question in a way that conflicts with relevant decisions of this Court."

There is no legal requirement that petitioners' due process violation impacts a class (and thus no legal basis for Kanter to raise such an argument), although if such a requirement existed, petitioners would meet it. As petitioners point out, the Superior Court's holding that raising an imprecise number of issues deemed to be "too many" in a Rule 1925(b) statement will result in a waiver of all issues will necessarily impact future litigants. The Superior Court has given no guidance as to how many issues constitutes too many issues and in their prior cases have found no waiver in appeals where more issues were presented than by petitioners herein. Consequently, future litigants and their counsel must face the prospect of culling otherwise meritorious issues from a Rule 1925(b) statement or risk waiver because some appellate court will deem the ultimate number excessive. Future defendants may well face the prospect of a trial judge unilaterally imposing punitive damages after a jury verdict absolving the defendant of liability for punitive damages.

3. Focusing exclusively on the denial of appellate rights, Kanter asserts that, because the right of appeal is not essential to due process, petitioners' claim is not one of constitutional dimension, and that the Superior Court's decision is sustainable as a matter of state law.

Kanter ignores the fact that the denial of appellate rights is just one of the numerous due process violations to which petitioners were subjected and by focusing on the appellate aspect only fails to address the due process

deprivation in the denial of a jury trial on punitive damages and their right to confront the *ex parte* evidence relied upon by the trial court in overturning the jury's defense verdict on punitive damages and unilaterally awarding punitive damages to Kanter.

However, even as to the denial of appellate rights, Kanter ignores the fact that this Court has recognized there are circumstances where due process requires an appeal. This Court's decision in *Lindsey v. Normet*, 405 U.S. 56, 77 (1972), held that due process does not require an appeal where there has been a full and fair trial on the merits, and that in the instant case there has not been a full and fair trial on the issue of punitive damages. Having been denied a full and fair trial on punitive damages, petitioners' appellate rights become the last bulwark against the improper taking of property under government aegis. Thus, the denial of any appellate review constitutes a serious constitutional infringement. This Court's decision in *Oberg* affirmed that appellate review constitutes a significant aspect of due process protection where the constitutionality of an award of punitive damages is at issue by invalidating an amendment to the Oregon Constitution that limited review of such award. The same rationale applies herein.

Kanter also ignores this Court's decisions holding that, where a fundamental right such as a right to appeal is granted under state law, it cannot be denied arbitrarily or capriciously without offending federal due process. *Lindsey*, 405 U.S. at 77. Pennsylvania law guarantees a right to both a jury trial and an appeal. Petitioners have been denied both through arbitrary and capricious action.

The federal cases cited by Kanter, where this Court has declined to review state court appellate procedures, are totally inapposite. In *Johnson v. Fankell*, 520 U.S. 911 (1997), a state employee brought a claim in state court under 42 U.S.C. § 1983. The trial court denied a defendant's motion dismiss based on a qualified immunity defense. The defendants' appeal was dismissed because, in contrast to federal law recognizing a right to an interlocutory appeal of a trial court order denying qualified immunity, the state court did

not recognize such right to an interlocutory appeal. This Court rejected assertions that Section 1983 preempted state law and that the state court was required to interpret the state law in accordance with federal standards. *Johnson* has no applicability herein. There was no claim that state court appellate procedures (not to mention trial procedure) violated the federal Constitution. In fact, the defendant was not deprived of any rights whatsoever – the only issue was the timing of the appeal.

Wolfe v. North Carolina, 364 U.S. 177 (1970) is similarly irrelevant. In *Wolfe*, appellants were African-Americans charged and convicted of trespass for playing golf at a municipally owned facility in North Carolina. During the criminal proceedings, appellants filed a civil suit in federal court alleging a denial of equal protection and obtained an injunction prohibiting the municipality from operating the golf course in a racially discriminatory manner. Appellants appealed their conviction for trespass claiming that the state court was required by the Supremacy Clause of the United States Constitution to give conclusive effect to the factual findings of a federal court in a civil action based on the same events. This Court dismissed the appeal without reaching the merits on the ground that state court record showed that the appellants had not offered the federal findings into evidence in the state court, and therefore the state court properly decided the appeal on independent state grounds. Additionally, this Court gave great weight to the record in the state court criminal proceedings demonstrating that race played no role in the criminal convictions.[2] *Wolfe*, 364 U.S. at

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[2] As stated by this Court in *Wolfe*, 364 U.S. at 196: "From first to last the courts of North Carolina fully recognized that under the Constitution these appellants could not be convicted if they were excluded from the golf course because of their race. The trial judge so instructed the jury, and the Supreme Court of North Carolina so held. . . . Upon the evidence in this case the jury's verdict established that no such racial discrimination had in fact occurred. 'On review here of State convictions, all those matters which are usually termed issues of fact are for conclusive determination by the State courts and are not open

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193. A significant factor in this Court's decision was the factual nature of the dispute in the state court and this Court's extreme reluctance to intercede in such factual disputes. *See* Supreme Court Rule 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings. . . .").

In contrast, in this case, the Pennsylvania Courts have completely avoided the federal constitutional issues despite the issues having been properly raised. "It is settled that a state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward nonfederal grounds of decision which are without any fair or substantial support." *Wolfe*, 364 U.S. at 185. Ignoring the substantial federal issues, the Superior Court *sua sponte* created a new rule of waiver, contrary to its past decisions, without any notice to petitioners or opportunity for petitioners to be heard, and applied that new rule retroactively in this case. Neither the Superior Court *en banc*, nor the Pennsylvania Supreme Court ever proffered any reason for the non-review of the additional due process issues raised by the Superior Court's decision on waiver. In sum, the federal questions were never addressed by any Pennsylvania court. Additionally, in contrast to *Wolfe*, the issues addressed to the state courts, and to this Court, are legal and not factual issues.

In *Nat'l Union of Marine Cooks and Stewards v. Arnold*, 348 U.S. 37 (1954), this Court addressed whether a state court was prevented by the due process clause from dismissing an appeal from a money judgment where the appellant defied a court order to deliver bonds held outside the state court's jurisdiction. The Court found no due process violation and recognized the inherent authority of a state court to induce compliance with its orders. *Arnold* is completely distinguishable from this matter as this Court prefaced its decision with the finding that "the petitioner had his day in court. The dismissal cut off only a

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for reconsideration by this Court. Observance of this restriction in our review of State courts calls for the utmost scruple.'" (citations omitted).

statutory right of review after a full trial by judge and jury." *Arnold*, 348 U.S. at 41. In contrast, petitioners herein were denied their right to a trial by the trial court's imposition of an award of punitive damages after a jury verdict in their favor. Moreover, the decision in *Arnold* was premised on defiance of a court order to deliver bonds to the court to act as a supersedeas. Petitioners herein violated no court order with respect to the Rule 1925(b) statements. Third, in *Arnold*, the state court afforded an opportunity to the appellant to comply with the court's order before the sanction of dismissal was imposed. No such opportunity was permitted here and peititoners were sanctioned without any notice or opportunity to be heard.

Kanter further contends that the Superior Court's decision is merely an exercise of its right to interpret state procedural law and impose waiver. Kanter's argument ignores that (1) there existed no statute, rule or case law that imposed a waiver of all issues where "too many" issues were raised in a Rule 1925(b) statement and where no single issue was identified as frivolous or in bad faith,[3] (2) Superior Court panels had held that raising a large number of issues in a Rule 1925(b) statement would not result in waiver of all issues, (3) the issue of waiver was

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[3] The Pennsylvania cases on waiver cited by Kanter in the Brief in Opposition all relate to either (1) a finding of waiver where no Rule 1925(b) statement is filed, or (2) whether the issues presented in a Rule 1925 statement were too vague to allow for effective review. *Commonwealth v. Dodge*, 859 A.2d 771 (Pa. Super. 2004) (no waiver of issues despite appellants incorporation by reference of other documents into his Rule 1925(b) statement); *Commonwealth v. Heggens*, 809 A.2d 908 (Pa. Super. 2002) (an untimely Rule 1925(b) statement that is so vague that the trial court has to speculate as to the issue will result in waiver of the issue); *Schaffer v. Ames Capital Corp.*, 805 A.2d 534 (Pa. Super. 2002) (failure to file any Rule 1925 statement despite court order will result in waiver of appellate issues). Kanter cites 8 additional cases all standing for the same propositions which are not controlling here. Indeed, the cases relating to a failure to file a Rule 1925 statement or the filing of a vague statement are not applicable herein as the matters complained of in petitioners' timely-filed Rule 1925(b) statements, while numerous, are concise, clearly stated with citation to the record, and propounded in good faith. App. 33-35, 48-50.